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No. 84-115 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARIO LOPEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE PETITIONER IN REPLY TO THE SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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5 pp

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We file this memorandum to reply to what seems to be a complete misapprehension by respondents in their supplemental brief regarding the import of the order we suggest that the Court enter in this case. See Reply Br. 8.

The order we suggest that the Court enter in this case is identical to that entered by the Court in *Heckler* v. *Kuehner*, No. 83-1593 (Nov. 5, 1984), with only one exception. In *Kuehner*, the Court vacated the judgment of the court of appeals in its entirety.[1] In this case, we propose that the Court's order provide that the judgment of the court of

[1]The Court's order provided in pertinent part:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit * * *.

appeals "is vacated insofar as it affirms the exercise of jurisdiction over the case of any class member who received an administrative decision prior to December 6, 1982 that his disability has ceased and who did not seek further administrative or judicial review of that decision within 60 days." Reply Br. 8. Respondents contend (Resp. Supp. Br. 4-5) that this language might be viewed as expressing an opinion on the merits of the 60-day question. They even go so far as to assert that the language we propose is a "disingenuous attempt to secure a precedential order" on that issue. Respondents' contention and gratuitous accusation are totally unjustified. Respondents' eagerness to perceive a hidden meaning in our submission apparently has caused them to overlook the self-evident reason for the language we propose.

In *Kuehner*, the Secretary sought review of the judgment of the court of appeals in its entirety, and this Court's order therefore vacated the judgment in its entirety and remanded the case to the court of appeals to be remanded to the district court for disposition under the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* In this case, by contrast, the Secretary did not seek review of all aspects of the judgment of the court of appeals. She sought review only with regard to the class members who had not satisfied the 60-day time limit requirement. See Pet. 15-16 & n.9, 29 & n.18. Accordingly, in the conclusion to the certiorari petition, we stated that "[t]he judgment of the court of appeals should be reversed insofar as it affirms the application of Paragraph 4(c) of the district court's preliminary injunction to class members who received an adverse administrative decision prior to December 6, 1982, and did not seek further administrative or judicial review of that decision within 60 days." Pet. 29. Now, in the reply brief, in light of the passage of the Social Security Disability Benefits Reform Act of 1984 since the filing of the certiorari petition, we no longer argue that the Court should *reverse* the judgment of the court of appeals;

we argue instead that the Court should *vacate* the judgment of the court of appeals as to these same class members and remand to the district court for disposition of their individual cases under the 1984 Act.

The language in our proposed order to which respondents object thus simply identifies the portion of the judgment below that we sought to have reviewed by this Court and that accordingly should now be vacated by the Court. If the Court enters an order that vacates the judgment of the court of appeals to that extent, it obviously will not constitute a decision on the merits of the 60-day time limit issue presented in the certiorari petition, as respondents seem to believe (Resp. Supp. Br. 4-6). Rather, it would merely *remove* the precedential value of a patently erroneous court of appeals decision on the 60-day issue that this Court is disabled from reviewing because of the intervening statute. However, because respondents appear to view this singling out of the 60-day issue as somehow objectionable, we would agree to respondents' alternative proposal (Resp. Supp. Br. 6) that this Court vacate the judgment of the court of appeals in its entirety.

In either event, there is no reason for the Court to remand the case to the court of appeals for further consideration in light of the 1984 Act, as respondents suggest (Resp. Supp. Br. 6). In its order in *Kuehner*, the Court remanded the case to the court of appeals to be remanded to the district court with instructions to remand the cases of the individual class members to the Secretary pursuant to the 1984 Act and to take other actions appropriate in light of that Act. Respondents offer no reason for a different approach here. Intervening consideration by the court of appeals could only delay the statutorily prescribed remand to the Secretary under the 1984 Act, which Congress intended to occur expeditiously. There also is a strong interest in uniformity in the disposition of the class actions covered by the 1984 Act, which

further counsels in favor of entering essentially the same order in this case as in *Kuehner*.

It is therefore respectfully submitted that the Court should enter the order suggested at page 8 of our reply brief.[2]

REX E. LEE
Solicitor General

DECEMBER 1984

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[2]Respondents contend (Resp. Supp. Br. 3) that this case differs from *Kuehner* because there, in respondents' view, the Third Circuit's decision constituted a "final disposition on the merits of issues directly affected by the 1984 Act," but here there was no such final disposition by the courts below. This attempted distinction is wholly without merit. In *Kuehner*, the Third Circuit did not even finally dispose of the jurisdictional issue; it instead contemplated that proceedings would be required in district court on whether the Secretary had taken a "final position" on the substantive issues involved. 83-1593 Pet. 16-17; Pet. App. 9a-10a. But beyond that, since the Third Circuit and district court had addressed only jurisdictional issues, they manifestly had not rendered a "final disposition" on the medical improvement and other substantive issues affected by the 1984 Act. Neither, of course, did the Ninth Circuit in this case, as respondents acknowledge. This case and *Kuehner* therefore are identical for present purposes.

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